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No. 98-1427

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

M.C. KRAMER, Warden, *Petitioner*,

v.

DWAYNE DAVIS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Do compelling reasons support the state's petition for a writ of certiorari when this Court has already granted a petition for writ of certiorari on another, factually indistinguishable case, and the Ninth Circuit's application of the Antiterrorism and Effective Death Penalty Act, ("AEDPA"), conflicts with no decision of another United States court of appeal?[1]

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[1] In its "Questions Presented," "Introduction to Reasons for Granting the Writ," and in footnote 1 of its Petition for Writ of Certiorari, the state introduces material outside of the record. The state repeatedly refers to statistics regarding no-merit briefs that were not presented (as argument or as admissible evidence), to either of the federal courts below. Davis accordingly moves to strike the last full sentence in the first paragraph of the Questions Presented, Cert. Petit. at i, the first sentence of the "Introduction" section, *id.* at 4, and footnote 1, *id.* at 4 n.1.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-1427

M.C. KRAMER, Warden, *Petitioner,*

v.

DWAYNE DAVIS, *Respondent.*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Dwayne Davis respectfully requests that this Court deny the petition of M.C. Kramer, Warden, ("the state"), for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of Judges Reinhardt, Noonan, and Hawkins for the Ninth Circuit Court of Appeals, Appendix A, is reported at No. 98-16122, 1999 U.S. App. LEXIS 918 (9th Cir. Dec. 8, 1998), *amended* Mar. 10, 1999. The opinion of the district court is not reported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on January 26, 1999, and amended its opinion on March 10, 1999. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

After a jury trial in San Francisco Superior Court in 1994, Mr. Davis was convicted of

first degree burglary. The court found that Davis had a prior serious felony conviction and sentenced him to eleven years in prison.

Mr. Davis was appointed counsel on direct appeal. Appellate counsel filed a brief pursuant to *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (Cal. Ct. App. 1979). Cert. Petit. App. D. Davis's counsel asked the appellate court to independently review the entire record on appeal. *Id.* at 46a. In the three-paragraph "Argument" section of this brief, counsel identified no legal issues and cited no legal authority save *Wende*. *Id.* Counsel did not seek to withdraw from her representation of Mr. Davis. *Id.*

The California Court of Appeal observed that Mr. Davis's counsel "has raised no issues." *See* Cert. Petit. App. C at 37a. Mr. Davis, however, filed a supplemental brief. Despite the lack of guidance from appellate counsel, the court considered whether a lesser-related offense instruction was warranted, *id.* at 39a, discussed the trial court's refusal to permit testimony of a police officer, *id.* at 40a, and found that substantial evidence supported the verdict, *id.* The court also discussed trial counsel's failure to call a fingerprint expert or ask an investigator to investigate the crime scene. *Id.* The court discussed, and dismissed, any claim of prosecutorial misconduct. *Id.* Finally, the court found that the case did not involve the improper use of prior convictions. *Id.* Having examined each of these issues, and after citation to controlling authority on several of these points, the court held that "[t]here are no meritorious issues to be argued." *Id.*

Mr. Davis filed a pro per petition for review with the California Supreme Court, raising the same issues presented in his supplemental brief to the Court of Appeal. ER 29-51[2]. The

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[2] The abbreviation "CR" refers to the district court record. The abbreviation "ER" refers to Respondent's Excerpts of Record.

Supreme Court denied review in July, 1995.

Mr. Davis then filed, pro per, a petition for writ of habeas corpus with the California Supreme Court alleging ineffective assistance of trial and appellate counsel. ER 54-73. The petition was summarily denied by the California Supreme Court in May, 1996. ER 53.

In December 1996, Mr. Davis filed pro per in federal district court for the Northern District of California a petition for writ of habeas corpus, under 28 U.S.C. § 2254. ER 76-110; CR 1. In his federal habeas petition, as eventually amended, Davis identified six claims of error, including ineffective assistance of appellate counsel for failure to raise any issues in the appellate brief to the California Court of Appeal. *Id.*

The state's petition for a writ of certiorari incompletely describes the holding of the district court when it states that the district court "concluded that Petitioner *was not entitled to relief* on any of the claims except for the claim of ineffective assistance of appellate counsel." Cert. Petit. at 3 (emphasis added). The district court actually held that Davis had not "establish[ed] his entitlement to *federal habeas* relief on any of the other issues raised in his petition . . . ." Cert. Petit. App. B at 25a (emphasis added). While the court found that these other issues did not meet the high standards required for federal habeas relief, the court made no reference to the prospects for the issues if raised on *state* direct appeal. Instead, the district court held that, under this Court's authority in *Anders* and *Penson*, these issues should have been identified by state appellate counsel:

> [Davis] has raised arguably nonfrivolous issues that could have been raised on appeal in the state court, *e.g.*, ineffective assistance of trial counsel, the sufficiency of the evidence and jury instruction error. Because appellate counsel failed to present these issues to the California Court of Appeals, counsel was ineffective.

Id. The district court ordered the state to permit Mr. Davis to take a delayed appeal within ninety days of its order, or his conviction would be vacated. *Id.* at 35a. The Warden appealed and obtained a stay from the court of appeals.

On January 26, 1999, the court of appeals affirmed the order granting the petition based on ineffective assistance of counsel. *See Davis v. Kramer*, No. 98-16122, 1999 WL 27487 (9th Cir. Jan. 26, 1999), Cert. Petit. App. A at 1a. The court in *Davis* reviewed the procedures required of appellate counsel, as articulated by this Court in *Anders v. California*, 386 U.S. 738 (1967). *See id.* at 4a-5a. The court observed that it had recently considered the requirements of *Anders* in another, pre-AEDPA case: *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1997), *petition for cert. granted, Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999). *Id.* at 6a. The court in *Davis* found the reasoning of *Robbins* equally applicable in AEDPA cases, because that reasoning was merely an application of this court's decision in *Anders*. *Id.* The court affirmed the district court's order granting the writ on the issue of ineffective assistance of appellate counsel. *Id.* at 17a.

The state then moved for a stay of mandate pending petition for writ of certiorari. The appellate court granted the stay on February 8, 1999.

On February 9, 1999, the federal public defenders for the Central and Eastern District of California filed a suggestion for modification of the court's opinion.

The state filed its petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit on March 3, 1999.

This Court granted the state's petition for a writ of certiorari in the *Robbins* case on

March 8, 1999. *Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999).

The Ninth Circuit court of appeals amended its decision in *Davis* on March 10, 1999. *See Davis v. Kramer*, No. 98-16122, 1999 U.S. App. LEXIS 918 (9th Cir. Jan. 26, 1999), *amended* Mar. 10, 1999, App. A. In *Davis*, the court of appeals acknowledged that the present case, unlike *Robbins*, was controlled by the AEDPA, 28 U.S.C. § 2254(d).

The court in *Davis* held that this Court's decision in *Anders* clearly established that "a no-merit brief such as the one filed by Davis's appellate attorney does not satisfy federal constitutional standards." *Davis*, 1999 U.S. App. LEXIS 918, at *12, App. A at 11a-12a. The court found that in *Davis*, as in *Anders*, appellate counsel left the defendant to "'shift entirely for himself.'" *Id.*, App. A at 12a (quoting *Anders*, 386 U.S. at 745, 744). The California court's denial of the claim on ineffective assistance of appellate counsel was, accordingly, "contrary to" *Anders*, and the district court's decision comported with the AEDPA. *Id.*

The court in *Davis* also considered whether a defendant need show prejudice to make an ineffective assistance of appellate counsel claim, when appellate counsel failed to identify any issues or request leave to withdraw. *Id.*, App. A at 12a-17a.

The court observed that the relevant provisions of the AEDPA permits a writ of habeas corpus to issue only when a state decision is "contrary to" or "involved an unreasonable application of" clearly established federal law. *Id.* at *4-*5, App. A. at 7a (quoting 28 U.S.C. § 2254(d)(1)). Other circuits, noted the court, had observed that the statutory terms were "not amenable to rigid distinction," and had "overlapping meanings." *Id.* at *16-*17, App. A. at 14a-15a (citing *O'Brien v. Dubois*, 145 F.3d 16, 22 (1st Cir. 1998), and quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)).

The Ninth Circuit in *Davis* declined to "establish a fixed division" between the terms. *Id.* at *17, App. A at 15a. The court set forth a non-exhaustive definition of "unreasonable application:" "a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision." *Id.* at *17, App. A. at 15a. The court in *Davis* disclaimed that it was not attempting "a complete definition of these statutory terms, or [to] set forth an inflexible rule." *Id.* at *17 n.7, App. A. at 15a n.7.

The Ninth Circuit reviewed this Court's analysis of prejudice in *Penson v. Ohio*, 488 U.S. 75 (1988). *Id.* at *18, App. A. at 15a. The court of appeals observed that this Court in *Penson* "completely rejected the claim that a showing of prejudice was required." *Id.* at *15, App. A at 13a.

The state attempted to distinguish this Court's reasoning in *Penson* by noting that Davis's appellate counsel had failed to seek leave to withdraw after filing a no-merits brief. *Id.* at *15-*16, App. A at 14a. In *Penson*, by contrast, appellate counsel formally withdrew. *Id.* The court in *Davis* found that this distinction did not remove the present case from the control of *Penson*. *Id.* The Ninth Circuit stated that the legal principles established by this Court in *Anders* and *Penson* "extend to cases in which appellate counsel does not formally withdraw." *Id.* at *18, App. A at 16a. The court noted that its view of *Penson*'s reach was consistent with the reasoning of the Fifth Circuit in *Lofton v. Whitley*, 905 F.2d 885 (5th Cir. 1990). *Id.* at * 20, App. A. at 16a. In *Lofton*, the Fifth Circuit concluded that "the failure to raise any grounds for appeal was the equivalent of [the defendant's] attorney's withdrawal." *Id.* at *20-*21, App. A at 16a-17a

(quoting *Lofton*, 905 F.2d at 888). The court in *Davis* held that it was "an unreasonable application of clearly established Supreme Court law not to extend *Penson*'s rule of presumed prejudice" to the circumstances when appellate counsel does not file a brief comporting with *Anders*, and fails to withdraw. *Id.* at *21, App. A at 17a.

SUMMARY OF THE ARGUMENT

No compelling reasons support the grant of the state's petition for a writ of certiorari. After the state's petition was filed in the present case, this Court granted the state's petition for a writ of certiorari in a factually indistinguishable Ninth Circuit decision involving identical substantive issues: *Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999). No factual or legal aspect of the *Davis* decision would contribute to the Court's analysis of the substantive issues already presented by *Robbins*.

Review by this Court is also not merited by the Ninth Circuit's interpretation and application of the AEDPA in *Davis*. In its writ petition the state candidly admits that the AEDPA analysis in *Davis* does not clearly conflict with the decision of any federal circuit. Rather, the court in *Davis* refers to and incorporates the reasoning of other federal circuits, and does not distinguish any federal decision. The definition of the AEDPA statutory language adopted by the court in *Davis* is non-exhaustive and case-specific, and does not represent an important federal question that warrants review by this Court.

Finally, the present case is not one of the rare examples warranting a grant of writ of certiorari when a court of appeals has misapplied a properly stated rule of law. *See* S. Ct. Rule 10.

NO COMPELLING REASONS SUPPORT THE GRANT OF THE WRIT

I. The Ninth Circuit's Application of *Anders* and Interpretation of the AEDPA Present No Compelling Reason Supporting the Grant of the Writ of Certiorari

The state has asked this Court to review *Davis* based on an issue that is currently before this Court in *Robbins*; the requirements of an *Anders* brief. The state has also sought review in light of a second issue, the interpretation of statutory language in the AEDPA. Neither of these two issues presents a compelling reason supporting the grant of the writ of certiorari.

The rules of this Court make clear that "A petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. Rule 10. The character of the reasons considered by this Court includes when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or "has decided an important federal question in a way that conflicts with a decision by a state court of last resort." *Id.* at 10(a). Another example of a reason supporting the grant of certiorari is when a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* at 10(c).

One basis for the state's petition for a writ of certiorari is an alleged "significant split of authority" created by the Ninth Circuit's view of *Anders* as stated in *Davis*. Cert. Petit. at 6-11. As did Mr. Robbins in his Opposition to the state's Petition for a Writ, Mr. Davis disputes both the existence and significance of this alleged split in authority. Mr. Davis's position is, however, largely moot: this Court has granted the state's petition in *Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999). As discussed in greater depth below, the facts of and analysis

in *Davis* would add nothing to the issues currently before this court in the *Robbins* case.

Equally unworthy of this Court's review is the Ninth Circuit's measured interpretation of the statutory language in the AEDPA. The court's definition and application of the "unreasonable application" prong of § 2254(d)(1) is not inconsistent with that of other federal circuits, and does not represent a decision on "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10 (c).

II. The Decision of the Ninth Circuit in *Davis* Presents No Issues Regarding Effective Assistance of Appellate Counsel Not Before This Court in *Robbins*

This Court has granted the state's petition for a writ of certiorari to the Ninth Circuit based upon that Circuit's decision in *Robbins*. *Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999). In regards to the substantive legal issue involved in both *Robbins* and *Davis*, the reach of *Anders* and *Penson*, the two Ninth Circuit cases are factually and legally indistinguishable. There exists no compelling reason to grant the petition for a writ of certiorari for the *Davis* opinion when *Robbins* is already before this Court.

The state incorrectly describes the Ninth Circuit as "relying" on its opinion in *Robbins* for its holding in the *Davis* case. Cert. Petit. at 3. The court in *Davis* actually observed that *Robbins* did not control *Davis*, because *Davis* was a post-AEDPA case. *Davis*, No. 16122, 1999 U.S. App. LEXIS 918, at *11, App. A at 11a. The court instead agreed with the reasoning of *Robbins* that concluded *Anders* did not permit *Wende* briefs. *Id.* at *8, App. A at 9a ("Although *Robbins* was a pre-AEDPA case, because our decision there was simply an application of *Anders*, *Robbins* reasoning is equally applicable in AEDPA cases").

While *Robbins* did not control the *Davis* decision because of the intervention of the

AEDPA, the similarities between the *Robbins* and *Davis* cases now weigh against the grant of a writ of certiorari in the *Davis* case. The court in *Davis* described how that case was "factually indistinguishable" from its decision in *Robbins v. Smith*:

> In *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), we applied *Anders* to a case factually indistinguishable in all relevant aspects from the case at bar. . . .
> . . . .
>
> In *Robbins*, defendant's appellate counsel filed a "no-merit brief" pursuant to *People v. Wende*, 600 P.2d at 1074. *Robbins*, 152 F.3d at 1064. The brief filed in *Robbins* was indistinguishable from the brief filed by Davis' appellate counsel here: it "briefly outlined the facts surrounding Robbin's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues." *Id.* As here, Robbins filed an appellate brief on his own behalf, but his appeal was unsuccessful. As here, the district court granted Robbins' petition for a writ of habeas corpus, holding that Robbins' appellate counsel had failed to satisfy the requirements established in *Anders*.
>
> The state argued in *Robbins*, as it does here, that because the no-merit brief complied with the standards enunciated by the California Supreme Court in *Wende*, the district court erred in determining that the brief was insufficient under *Anders*. *Robbins*, 152 F.3d at 1066. . . .

Davis, No. 16122, 1999 U.S. App. LEXIS 918, at *8-*9, App. A. 9a-10a.

The factual similarities between *Robbins* and *Davis* do not end at the briefs filed by state appellate counsel. In both cases, state appellate counsel did not seek to withdraw after filing the no-merit *Wende* brief. *See Robbins*, 152 F.3d at 1064, *Davis*, No. 16122, 1999 U.S. App. LEXIS 918, at *15-*16, App. A. at 14a. In *Robbins*, the district court found that at least two nonfrivolous appellate issues existed in addition to the *Anders* claim. *Robbins*, 152 F.3d at 1067. In *Davis*, the district court identified "arguably nonfrivolous issues that could have been raised on appeal in the state court, e.g. ineffective assistance of trial counsel, the sufficiency of the evidence, and jury instruction error." Cert. Petit. App. B at 25a. In both *Robbins* and *Davis* the

Ninth Circuit relied on this Court's decision in *Penson* for the presumption of prejudice arising from the constructive denial of the assistance of counsel. *Compare Robbins*, 152 F.3d at 1069 ("*Cf. Penson*, 488 U.S. at 88-89, 198 S. Ct. 346 (the actual or constructive denial of assistance of counsel is presumed to result in prejudice)") *with Davis*, No. 16122, 1999 U.S. App. LEXIS 918, at *20-*21, App. A. at 17a. ("Accordingly, as the Fifth Circuit confirms, even where an attorney does not formally withdraw from the case, *Anders* and *Penson* dictate that the attorney's failure to comply with the requirements of *Anders* results in the deprivation of the defendant's right to counsel.")

By seeking the writ in *Robbins*, the state has now successfully brought before this Court the rejection of *Anders* and *Penson* by the California Supreme Court in *Wende*. The state has identified no compelling reason why *Davis* would contribute to the Court's analysis of the issues already fully presented in *Robbins*. The state's petition for a writ of certiorari on the *Davis* opinion should accordingly be denied.

III. The Reading of the AEDPA's Statutory Language in *Davis* Conflicts With No Decision of a Federal Circuit Court, is Not An Important Federal Decision Meriting This Court's Review, and Is Not An Erroneous Application of Law

A. The Ninth Circuit's reading of the AEDPA term "unreasonable application" does not merit review by this Court

As of the date this Opposition Brief was filed, the state has not filed any comment on the *Davis* opinion as amended on May 10, 1999. Many of the objections articulated in its original petition, however, would presumably still apply to the amended opinion and will be addressed in this Opposition brief.

In a remarkably candid concession, the state admits in its writ petition that it is not "clear

how the [Ninth Circuit's definition of 'unreasonable application'] differs from those in other circuits." Cert. Petit. at 12. Mr. Davis agrees. In defining statutory language in the AEDPA, the Ninth Circuit looked to and adopted the reasoning of its sister circuits, and employed the most unambitious definition possible given the facts of this specific case. The court's unremarkable application of the statutory language does not present a compelling reason for this Court to "resolve authoritatively the meaning of 'unreasonable application' in § 2254(d)(1)." Cert. Petit. at 13.

The court in *Davis* first observed that the Ninth Circuit had yet to define the term "unreasonable application" as used in § 2254(d), and had not explained the difference between the terms "unreasonable application" and "contrary to" found in that section. *Davis*, No. 16122, 1999 U.S. App. LEXIS 918, at *16, App. A. at 14a. The court looked to the First Circuit's observation that the terms are not amenable to a rigid distinction. *Id.* at *16-*17, App. A at 14a (citing *O'Brien v. Dubois*, 145 F.3d 16, 22 (1st Cir. 1998)). The court agreed with the Fourth Circuit that the two terms have "overlapping meanings." *Id.* at *17, App. A. at 15a (quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)).

The court found it unnecessary to forge new meanings or definitions for "contrary to" and "unreasonable application of." It explained that "No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other." *Id.* The court then attributed an unremarkable goal to both terms: "to ensure the objective that state courts follow controlling Supreme Court law." *Id.* The court emphasized that "it did not attempt a complete definition of these statutory terms, or set forth an inflexible rule." *Id.* at *17 n.7, App. A at 15a n. 7. Its definition of "unreasonable application" was "not intended to be exhaustive."

Id. at *18 n.8, App. A at 15a n.8

With these many limiting caveats in hand, the court then presented its modest definition of "unreasonable application" for the case before it:

> For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one of more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.

Id. at *17, App. A at 14a.

As conceded by the state in its petition, it is "not clear how this definition differs from those in other circuits." Cert. Petit. at 12. In fact, the court turned to the analyses of the First and Fourth Circuits as it considered the interplay of the terms "contrary to" and "unreasonable application of" under the AEDPA. *See Davis*, No. 16122, 1999 U.S. App. LEXIS 918, at *16-*17, App. A at 14a-15a. In describing the "circumstances comprehended by the term" it construed, the court explicitly incorporated an example taken from the Fourth Circuit's decision in *Green v. French*. *Id.* at *18 n.8, App. A at 15a n. 8 (citing *Green*, 143 F.3d at 870).

The court in *Davis* incorporates, rather than distinguishes, the § 2254(d)(1) analyses of its sister circuits. Moreover, as the federal circuits have considered the application of the "unreasonable application" language, they have gradually moved towards a more consistent approach. *See, e.g., Nevers v. Killinger*, No. 98-1039, 1999 WL 97993, *10 (6th Cir. Mar. 1, 1999) (reconciling the standards used in the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits). The case-specific definition relied upon by the court in *Davis* does nothing to impede the evolution of a uniform definition of the term "unreasonable application," and certainly does not warrant the intervention of this Court into the process of defining the AEDPA.

B. The court in *Davis* correctly applied the "unreasonable application" test, and even if it misapplied the correctly-stated rule of law, this is not the rare case where a writ of certiorari is warranted.

After conceding that there is no real split in authority over the definition of "unreasonable application," the state then argues that "[e]ven if the Ninth Circuit's interpretation were correct, the court's application of the test was not." Cert. Petit. at 13. Specifically, the state attempts to distinguish *Penson* from *Davis*, based on the existence of "arguable issues" in the former case and their (asserted) absence in the latter.

The state's position is troubling in two respects: it ignores the rules of this Court, and it fails to acknowledge that the federal district court and the Ninth Circuit found "arguable issues" in the present case.

The state's petition makes no reference to Supreme Court Rule Ten. This rule cautions that "A petition for a writ of certiorari is *rarely granted* when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10 (emphasis added). If, as the state posits, the Ninth Circuit correctly defined "unreasonable application," but incorrectly applied the term to the facts of the case in *Davis*, the state's petition for a writ of certiorari should not be granted.

Of equal concern is the state's characterization of this Court's decision in *Penson*. The linchpin of the state's argument that the Ninth Circuit incorrectly applied the "unreasonable application" test is an attempt to distinguish *Penson* from the present case. In its petition for a writ of certiorari, the state emphasizes that, "*Penson* involved *a complete denial of counsel* on appeal *when the reviewing court found arguable issues*." Cert. Petit. at 14 (emphasis in original). The state attempts to distinguish the present case, because "[h]ere, counsel did not withdraw

before the court reviewed the record, *and* the court did not find any arguable issues." *Id.* (emphasis in original). *See also id.* at 15 ("And *because the court found no arguable issues*, Davis, unlike the defendant in *Penson*, had no right to adversary representation") (emphasis added).

The state's argument is incorrect in two respects. First, the state ignores the presumption of prejudice for failure to comply with *Anders*, clearly articulated by this Court in *Penson*. *See Penson*, 488 U.S. at 86. ("The primary difficulty with the State's argument [that a defendant must show prejudice under *Strickland* and counter the harmless error test of *Chapman*] is that it proves too much").

Second, even if the defendant was required to show the existence of "arguable issues" under *Penson*, the state grafts onto that case a limitation that *only* the state appellate court can determine the existence of these issues. In so doing, the state ignores the fact that in *Anders* the state appellate court had found no issues of merit; a finding that did not prevent this Court from identifying the arguable issue of improper comments by the trial judge and prosecutor on the defendant's failure to testify. *Anders*, 386 U.S. at 743. In the present case, as in *Anders*, a federal court found arguable issues where the state court had found none.

While the federal district court in *Davis* did not find error permitting federal habeas relief, it did identify at least three arguable issues that could have been raised on direct appeal before the state court:

> Although Davis does not establish his entitlement to federal habeas relief on any of the other issues raised in his petition, he has raised arguably nonfrivolous issues that could have been raised on appeal in the state court, *e.g.*, ineffective assistance of counsel, the sufficiency of the evidence, and jury instruction error.

Davis, No. C 96-4646 MHP (N.D. Cal. Mar. 25, 1998), Cert. Petit. App. B at 25a.

The Ninth Circuit noted that the district court had identified arguable underlying claims:

> In granting Davis' writ on his claim of ineffective assistance of appellate counsel, the district court held that Davis had raised at least three arguable underlying claims: ineffective assistance of trial counsel, insufficiency of the evidence, and jury instruction error.

Davis, 1999 U.S. App. LEXIS 918, at *22, App. A at 17a.

Mr. Davis agrees with the court of appeals that the existence of arguable issues is ultimately irrelevant: as stated in the Ninth Circuit's opinion, *Penson* acknowledged the presumption of prejudice when the procedures of *Anders* are not followed. *Davis*, No. 98-16122, 1999 U.S. App. LEXIS 918, at *20-*21, App. A at 16a-17a. Even if, however, Davis is required to identify arguable issues, in its writ petition the state failed to report that two reviewing courts, the federal district court and the Ninth Circuit Court of Appeals, have in fact done so. *See* Cert. Petit. at 3 (failing to report in the "Statement of the Case" section that the district court had identified arguably nonfrivolous issues); Cert. Petit. at 13-15 (failing to report that the district court and the Ninth Circuit had identified arguably nonfrivolous issues).

The state presumably intended to argue that the district court erred when it found the existence of arguable issues in Mr. Davis's petition for a writ of habeas corpus, and that the appellate court erred when it did not reverse that finding. Notably, that is precisely the argument the state articulated in its briefing to the Ninth Circuit: "The district court also erred when it concluded that because Petitioner had raised 'arguably nonfrivolous issues that could have been raised on appeal in the state court' counsel was ineffective." *State's Opening Brief on Appeal* at 21. If the state in fact intended to revist this argument previously made before the Ninth Circuit,

it now presents an issue not appropriate for this Court's review. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

The state's challenge to the Ninth Circuit's interpretation and application of the AEDPA is, in the final analysis, an attempted second bite at the *Robbins* substantive apple. The state has identified nothing in the Ninth Circuit's interpretation of the statutory term "unreasonable application" that merits this Court's review. Instead, the state uses the AEDPA issues as a means to again urge this Court to review the Ninth Circuit's approach towards *Wende* and *Anders*. This battle, the state has won: this Court has granted the writ of certiorari in *Robbins*. There remains no compelling reason for the state to again bring the identical substantive issues before this Court in *Davis*, or to place the identical issues before this Court yet again in the guise of an AEDPA analysis.

Developments that have arisen since the state filed its petition for a writ of certiorari on March 3, 1999 have undercut any reasons that might have supported review of the *Davis* decision. Should this Court wish to address the definition of "contrary to" and "unreasonable application of" in 28 U.S.C. § 2254(d)(1), there are cases whose treatments of the terms are far more ambitious and sweeping and that would serve as a better vehicles for review. *See, e.g., Nevers v. Killinger*, No. 98-1039, 1999 WL 97993 (6th Cir. Mar. 1, 1999) (gathering the § 2254(d)(1) analyses of the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits and reconciling their definitions of 'unreasonable application.'").[3] Should this Court wish to revisit and reaffirm its decisions in *Anders* and *Penson*, it currently has all of the *Davis* substantive

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[3] *Nevers* was filed two days before the state's writ petition, but was not cited in its brief.

issues before it in the form of the *Robbins* decision. *See Smith v. Robbins*, No. 98-1037, 1999 WL 114464 (U.S. Mar. 8, 1999). In light of the more comprehensive AEDPA analysis of *Nevers*, and this Court's stated intention to review *Robbins*, no compelling reason remains to grant the state's petition for a writ of certiorari in the present case.

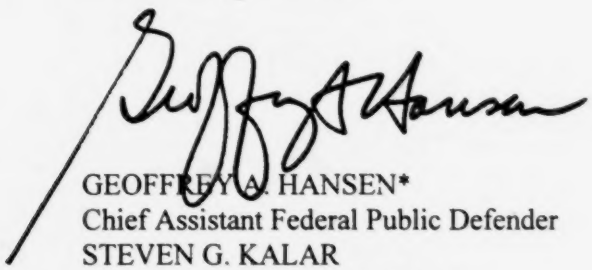
CONCLUSION

For the foregoing reasons, the state's petition for a writ of certiorari should be denied.

Dated: March 18, 1999

Repectfully submitted,

BARRY J. PORTMAN
Federal Public Defender



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Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DWAYNE A. DAVIS, *Petitioner-Appellee,* v. M. C. KRAMER, *Respondent-Appellant.*	No. 98-16122 D.C. No. CV-96-04646-MHP ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and Submitted
December 8, 1998—San Francisco, California

Filed January 26, 1999
Amended March 10, 1999

Before: Stephen Reinhardt, John T. Noonan, and
Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court. The court held that a state criminal appellate attorney's "no-merit brief" that satisfies the state law standard may still violate the appellant's federal constitutional right to effective assistance of counsel on appeal.

In appellee Dwayne Davis's appeal from his criminal conviction, appellate counsel filed a "no-merit brief" in accordance with the standards prescribed by the California Supreme Court in its "*Wende*" decision. The brief did not identify any possibly meritorious arguments or point to anything in the record that might have warranted an appeal. Counsel merely requested that the appellate court independently review the record.

Davis filed an appellate brief on his own behalf, contending that his trial attorney had provided ineffective legal assistance. The California Court of Appeal affirmed. The California appellate courts also denied Davis's habeas corpus petitions asserting ineffective assistance of trial and appellate counsel.

On federal habeas corpus, Davis again raised claims of ineffective trial and appellate counsel. Additionally, he asserted that the evidence was insufficient to support his conviction, and that the trial court erred by failing to instruct the jury on a lesser-included offense.

The district court granted Davis's petition, concluding that he had been denied the effective assistance of appellate counsel because the appellate attorney's submission of a *Wende* brief failed to satisfy the federal constitutional standards set forth in *Anders v. California*, 386 U.S. 738 (1967) and *Penson v. Ohio*, 488 U.S. 75 (1988). On the merits of Davis's claims, the court ruled that they did not provide any basis for federal habeas relief.

Anders held that criminal appellate counsel's submission of a "no-merit brief" does not satisfy the attorney's constitutionally mandated responsibility to act as an active advocate for the appellant, and deprives him of his right to counsel on appeal. In *Penson*, the court held that no showing of prejudice is required when there is an *Anders* violation.

On appeal, the State contended that the district court's decision did not comply with the requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA) because it was not supported by clearly established federal law, as determined by the Supreme Court; the district court erred in granting the petition without determining that Davis was prejudiced by appellate counsel's performance; that *Penson* did not control because Davis's appellate attorney did not formally withdraw; and that because the district court denied Davis's petition on the underlying claims, Davis could not vindicate any federal right by returning to state court for a fresh appeal.

[1] *Anders* established that a no-merit brief such as the one filed by Davis's appellate attorney does not satisfy federal constitutional standards. The state court decision was contrary to clearly established federal law as determined by the Supreme Court. Davis's counsel left Davis to shift entirely for himself, and thereby failed to fulfill the role of an active advocate required by the Constitution. Under *Anders* Davis was entitled to a fresh appeal. The California court's denial of Davis's writ was contrary to *Anders* and, in this regard, the district court's decision comported with the AEDPA.

[2] The legal principles established in *Anders* and *Penson* extend to cases in which appellate counsel does not formally withdraw. It is appellate counsel's failure to conform with *Anders*, irrespective of counsel's decision to formally withdraw, that leaves the defendant entirely to his own devices, and entirely without representation. Where the appellate attorney does not formally withdraw, but fails to comport with *Anders*, it amounts to an unreasonable application of clearly established federal law, as determined by the Supreme Court.

[3] The district court's denial of Davis's petition on his underlying claims indicated nothing more than the court's conclusion that the state court's rejection of those claims was not contrary to federal law. In a direct appeal, the state court

would apply an entirely different standard of review. For this reason, Davis might vindicate his federal rights by returning to state court for a fresh appeal. [4] Where a defendant suffers a violation of *Anders*, he need not show prejudice. He certainly need not show that he will prevail on appeal. Davis was entitled to a fresh state-court appeal.

COUNSEL

Seth K. Schalit, Deputy Attorney General, San Francisco, California, for respondent-appellant M. C. Kramer.

Steven Kalar, Assistant Federal Public Defender and Geoffrey A. Hansen, Chief Assistant Federal Public Defender, San Francisco, California, for petitioner-appellee Davis.

ORDER

The request of the Federal Public Defenders for the Central and Eastern Districts of California for leave to file a brief of amicus curiae is **GRANTED**.

The Opinion is amended as follows:

(1) At Slip Op. 638, the first paragraph is amended to read as follows:

> The two terms, read together, delineate the range of cases that warrant federal habeas relief under § 2254(d)(1). The terms overlap, and cases may fall into one or both classifications, depending on the circumstances. No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other. Their purpose is the same: to ensure the objective that state

courts follow controlling Supreme Court law.[FN7] For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.[FN8]

(2) Footnote 7 is amended as follows:

The first sentence will remain unchanged. The remainder of the footnote will read:

> While this is certainly true in some instances, in the *Moore* footnote we did not attempt a complete definition of these statutory terms, or set forth an inflexible rule. Nor do we here. We leave the terms with the full flexibility and potential for interchange with which we found them.

OPINION

REINHARDT, Circuit Judge:

The state of California appeals the district court's order granting Dwayne Davis a writ of habeas corpus. We must determine whether the California courts' denial of Davis' state habeas petition, in which Davis alleged that his appellate counsel failed to satisfy the constitutional requirements of *Anders v. California*, 386 U.S. 738 (1967), was "contrary to" or an "unreasonable application of" clearly established federal law. *See* 28 U.S.C. § 2254(d). Because we conclude that it was, we affirm the decision of the district court that the writ issue.

I.

In 1994, following a jury trial, Davis was convicted of first degree burglary. He was sentenced to eleven years in prison. In his appeal, Davis' appellate attorney limited her representation to filing a "no-merit brief" pursuant to the standards enunciated by the California Supreme Court in *People v. Wende*, 600 P.2d 1071 (Cal. 1979). The brief merely recited the procedural history and facts of the case. Not only did the brief fail to identify any possibly meritorious arguments, it flatly failed to point to anything in the record that might have warranted an appeal. The brief simply lodged a request that the court "independently review the entire record on appeal in this case."

Following his attorney's submission of this brief, Davis filed an appellate brief on his own behalf. He argued, *inter alia*, that his trial counsel was ineffective for failing to hire an independent fingerprint expert and for failing to conduct an investigation of the crime scene, and that the trial court erred in failing to instruct on a lesser included offense. In an unpublished decision, the California Court of Appeal affirmed the judgment of conviction.

In 1996, Davis filed pro se petitions for a writ of habeas corpus in California Superior Court, the California Court of Appeal, and the California Supreme Court. In each, he raised claims of ineffective assistance of trial and appellate counsel. Each court denied Davis' petition. The California Supreme Court summarily denied Davis' final petition in May of 1996. In December of 1996, Davis filed a pro se petition for a writ of habeas corpus in federal district court. In his federal petition, Davis again raised claims of ineffective assistance of trial and appellate counsel. He also argued, *inter alia*, that the evidence was insufficient to support his conviction, and that the trial court erred by failing to instruct the jury on the lesser included offense of trespass.

The district court granted Davis a writ. The court held that Davis had been denied the effective assistance of appellate counsel because that counsel's submission of a "*Wende*" brief, which raised no issues for appeal and pointed to no part of the record that might warrant such an appeal, failed to satisfy the federal constitutional standards enunciated in *Anders* and *Penson v. Ohio*, 488 U.S. 75 (1988). It then denied all of Davis' remaining claims.

II.

The state's primary argument in this appeal is that the district court's decision does not comport with the requirements of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). AEDPA wrought a number of changes in the statute governing habeas corpus proceedings by persons convicted of state offenses. Under § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

The state contends that the district court's decision was not supported by clearly established federal law, as determined by the United States Supreme Court, and was therefore improper. We reject the state's argument.[1]

[1]The district court noted that Davis' petition was subject to the requirements of § 2254(d). The court correctly held that "under AEDPA, the petition may not be granted . . . unless the state court's adjudication of the claim: '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.' "

In *Anders*, 386 U.S. at 739, the defendant had been convicted of felony possession of marijuana. On appeal, Anders' court-appointed counsel concluded that any appeal would lack merit and so notified the court in a letter brief. Other than informing him of his right to file a pro se brief, Anders' counsel failed to do anything else on his behalf. *See id.* at 739-40.

The Court delineated a court-appointed appellate counsel's duty to represent his client after "determin[ing] that there is no merit to the indigent's appeal." It began its analysis by reaffirming indigent defendants' right to counsel on appeal. The Court noted that it had "consistently held invalid those procedures 'where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.' " *Id.* at 741 (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). It then wrote that this "constitutional requirement of substantial equality and fair process" is only realized where the court-appointed counsel "acts in the role of an active advocate in behalf of his client." *Anders*, 386 U.S. at 744. In no uncertain terms, the court held that when appellate counsel simply submits a "no-merit letter," such as the one submitted by Anders' appellate counsel, he does not fulfill his constitutionally mandated responsibility to act in the "role of an active advocate." The court held that the submission of a no-merit letter is simply not "an adequate substitute for the right to full appellate review." *Id.* at 742 (*quoting Eskridge v. Washington State Bd.*, 357 U.S. 214, 215 (1958)).

The *Anders* Court then explained the procedure, required by the constitution, that an appellate counsel *must* follow if he determines that an appeal would be frivolous:

> [I]f counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw.

> That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal . . . .

Anders, 386 U.S. at 744.

Significantly, *Anders* goes on to hold that when an appellate attorney fails to comply with these constitutional standards, and merely files a no-merit brief of the sort filed on behalf of Anders, the defendant is deprived of his right to counsel on appeal. *See id.* at 745. In the Court's words, where counsel files a no-merit brief that does not comport with these standards, the defendant is left to "shift *entirely* for himself." *Id.* (emphasis added).

In *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), we applied *Anders* to a case factually indistinguishable in all relevant respects from the case at bar. Although *Robbins* was a pre-AEDPA case, because our decision there was simply an application of *Anders*, *Robbins*' reasoning is equally applicable in AEDPA cases.

In *Robbins*, defendant's appellate counsel filed a "no-merit brief" pursuant to *People v. Wende*, 600 P.2d at 1074. *Robbins*, 152 F.3d at 1064. The brief filed in *Robbins* was indistinguishable from the brief filed by Davis' appellate counsel here: it "briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal. Included in the short document was a request that the court itself review the record for arguable issues." *Id.* As here, Robbins filed an appellate brief on his own behalf, but his

appeal was unsuccessful. As here, the district court granted Robbins' petition for a writ of habeas corpus, holding that Robbins' appellate counsel had failed to satisfy the requirements established in *Anders*.

The state argued in *Robbins*, as it does here, that because the no-merit brief complied with the standards enunciated by the California Supreme Court in *Wende*, the district court erred in determining that the brief was insufficient under *Anders*. *Robbins*, 152 F.3d at 1066.[2] The *Robbins* court expressly rejected the state's argument. *Id.* at 1066-67. Relying on "the United States Supreme Court's requirements set forth in *Anders*," the court held that, despite the fact that the no-merit brief complied with *Wende*, the requirements of *Anders* "were not met." *Id.* at 1067. As the court wrote:

> The brief filed on Robbins's behalf completely failed to identify any grounds that arguably supported an appeal. Rather, it briefly summarized the procedural and historical facts of the case and requested that the state appellate court 'independently review the entire record for arguable issues.' Accordingly, the district court correctly found that Robbins's counsel did not comply with *Anders*.

Id.[3]

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[2]Under *Wende*, an appellate attorney may file a brief that merely "set[s] forth a summary of the proceedings and facts with citations to the transcript, raise[s] no specific issues, and call[s] upon the court to make a thorough review of the record to determine for itself whether there were any arguable issues." 600 P.2d at 1074. The nonexistence of arguable issues, moreover, may be inferred from counsel's failure to raise any, and counsel need not withdraw unless he explicitly describes the defendant's case as "frivolous." *Id.* at 1075.

[3]In *United States v. Griffey*, 895 F.2d 561, 562 (9th Cir. 1990), we held similarly that a brief, which satisfied the requirements of *Wende*, failed to comport with the constitutional requirements of *Anders*. The brief at issue in *Griffey* was, again, indistinguishable from the brief filed by Davis'

There would be no question that the case at bar is controlled by *Robbins* if this were a pre-AEDPA case. Again, the no-merit brief filed by Davis' appellate counsel is indistinguishable from the brief at issue in *Robbins*: both briefly summarized the procedural and factual histories of the cases, and requested that the state appellate court independently review the entire record for arguable issues. It is equally obvious, however, that in *Robbins* we were applying "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d), namely *Anders v. California*. *Robbins* was, in fact, *nothing more* than an application of *Anders* to facts indistinguishable from those presented here. In reaching its holding, the *Robbins* court wrote that "[o]ur obligation . . . is to determine whether appellate counsel met his obligations *under the United States Supreme Court's requirements set forth in Anders* and its progeny." *Robbins*, 15_ F.3d at 1066-67 (emphasis added). The court's conclusion was that although a *Wende* brief had been filed, "the district court correctly found that *Robbins's counsel did not comply with Anders*." *Id.* at 1067 (emphasis added). Finally, the court concluded that "the outcome of Robbins's case was *predetermined* by the controlling analysis provided by the Supreme Court in *Anders* . . . ." *Id.* at 1068 (emphasis added).

[1] As *Robbins* makes clear, *Anders* clearly establishes that

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counsel. The *Griffey* brief: "summarized the proceedings in the district court, recited the facts of the case, and stated that counsel had reviewed the record and 'located no specific issues' for appeal." *Id.* As here, counsel in *Griffey* "did not say the appeals were frivolous and did not move to withdraw," but asked the court to review the record. *Id.* Our holding in *Griffey* that the brief was inadequate was based entirely on Supreme Court precedent, namely *Anders*. Because, as *Anders* dictates, a brief must refer "to anything in the record that might arguably support the record," we held in *Griffey* that an attorney who files a *Wende* brief that fails to do so fails to fulfill his role as advocate, and leaves the defendant to "shift entirely for himself." *See id.* (*quoting Anders*, 386 U.S. at 744).

a no-merit brief such as the one filed by Davis' appellate attorney does not satisfy federal constitutional standards. Here, the state court decision we review is "contrary to . . . clearly established Federal law, as determined by the Supreme Court." As in *Anders*, Davis' counsel left Davis to "shift entirely for himself," and thereby failed to fulfill the "role of an active advocate" required by the constitution. *Anders*, 386 U.S. at 745, 744. Under *Anders*, Davis is entitled to a fresh appeal. The California court's denial of Davis' writ on his claim of ineffective assistance of appellate counsel is contrary to *Anders* and, in this regard, the District Court's decision comports with AEDPA.[4]

III.

The state next argues that the district court erred in granting petitioner a writ without determining that Davis was prejudiced by his appellate counsel's performance.[5] In *Penson v. Ohio*, 488 U.S. 75 (1988), the Supreme Court considered the question whether a petitioner who suffers ineffective assistance under *Anders* must also show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). In *Penson*, petitioner's appellate counsel, like Davis' appellate counsel here, filed a no-merit brief. 488 U.S. at 77-78. The attorney then

[4]In *Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997), the court held that *Faretta v. California*, 422 U.S. 806 (1975) "clearly established" a rule of law regarding the timeliness of a request for self-representation. In dicta, the *Moore* court suggested that the timeliness rule was "necessary to the [*Faretta*] Court's decision, and therefore is a holding of the Court." *Moore*, 108 F.3d at 265. *Moore* does not establish a requirement that a rule be "necessary" to a Supreme Court "holding" in order to clearly establish Federal law. It merely points out that such was the case with respect to *Faretta*.

[5]In its brief, the state also argues that the district court failed to determine whether counsel was "incompetent." By failing to comply with the requirements of *Anders*, counsel's performance failed to comport with constitutional standards. *See Anders*, 386 U.S. at 738. No separate *Strickland* competence analysis is called for when counsel fails to comply with *Anders*.

requested, and was granted, leave to withdraw from the case. As the Court wrote, "counsel was permitted to withdraw before the court reviewed the record on nothing more than a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief." *Id.* at 78. The state court subsequently granted petitioner 30 days in which to file an appellate brief pro se, but denied petitioner's request for the appointment of a new attorney. *See id.* The state court of appeals affirmed petitioner's conviction.[6]

The *Penson* Court first reiterated the holding of *Anders*, that "a criminal appellant may not be denied representation on appeal based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Id.* at 80. It then held that "[c]ounsel's failure to file such a brief left the Ohio court without an adequate basis for determining that he had performed his duty carefully to search the case for arguable error and also deprived the court of the assistance of an advocate in its own review of the cold record on appeal." *Id.* at 82. The state in *Penson*, argued, however, that even if the court had erred in granting appellate counsel's motion to withdraw and in failing to appoint new counsel, petitioner failed to show prejudice under *Strickland* and therefore the state court's affirmance of Penson's conviction was not in error.

The *Penson* Court completely rejected the claim that a showing of prejudice was required. As the Court wrote, requiring a showing of prejudice in cases such as this:

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[6]The court actually reversed petitioner's conviction on one count, on the ground that the trial court had given an erroneous jury instruction. *See Penson*, 488 U.S. at 79. It affirmed on all other counts noting that the petitioner had " 'suffered no prejudice' as a result of 'counsel's failure to give a more conscientious examination of the record' because the court had thoroughly examined the record and had received the benefit of arguments advanced by counsel for petitioner's two codefendants." *Id.*

> would leave indigent criminal appellants without any of the protections afforded by *Anders*. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protections afforded by *Douglas* and *Anders*.

488 U.S. at 86.

The state argues that *Penson* cannot control this case because in *Penson*, unlike in the case before us, the appellate counsel formally withdrew. According to the state, unless appellate counsel formally withdraws, the defendant is not "without representation," *id.* at 88, and thus it is inappropriate to apply *Penson*'s rule of presumed prejudice. We conclude, however, that while there is indeed a difference between *Penson* and the present case, a failure to apply *Penson* here would amount to an "unreasonable application of" clearly established federal law for purposes of 28 U.S.C. § 2254(d).

To date, we have not defined the term "unreasonable application" as used in § 2254(d), nor have we explained the difference between "contrary to" and "unreasonable application of," as used in that section. Clearly, however, both terms reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court. Moreover, as some other circuits have correctly pointed out, the statutory terms are not amenable to a rigid distinction, *see, e.g., O'Brien v. DuBois*, 145 F.3d 16, 22 (1st Cir. 1998), and

have "overlapping meanings." *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998).

The two terms, read together, delineate the range of cases that warrant federal habeas relief under § 2254(d)(1). The terms overlap, and cases may fall into one or both classifications, depending on the circumstances. No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other. Their purpose is the same: to ensure the objective that state courts follow controlling Supreme Court law.[7] For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.[8]

[2] It is true, as the state points out, that in *Penson* the appellate counsel formally withdrew from representing the petitioner, while in this case Davis' appellate counsel did not formally withdraw. *Anders*, 386 U.S. at 745. The legal princi-

[7]In a footnote in *Moore v. Calderon*, 108 F.3d 261, 265 n.3 (9th Cir. 1997), we stated in dicta that the "contrary to" test applies to questions of law, while the "unreasonable application" test applies to mixed questions of fact and law. While this is certainly true in some instances, in the *Moore* footnote we did not attempt a complete definition of these statutory terms, or set forth an inflexible rule. Nor do we here. We leave the terms with the full flexibility and potential for interchange with which we found them.

[8]The definition we offer here is not intended to be exhaustive. Rather, it sets forth certain circumstances in which a state court's determination amounts to an "unreasonable application." There are, of course, other circumstances comprehended by the term we construe. If, for example, a state court applies a Supreme Court precedent in a context where such application is unreasonable, the decision would amount to an unreasonable application. So too would a state court decision that, in applying federal law, simply misinterprets the relevant Supreme Court precedent. *See, e.g., Green*, 143 F.3d at 870.

ples established in *Anders* and *Penson*, however, extend to cases in which appellate counsel does not formally withdraw. As noted, the *Anders* Court established the rule that when an appellate counsel files a "no-merit" brief that fails to comport with the standards enunciated in that case, he fails to fulfill his "role as advocate," and thereby leaves the defendant to "shift *entirely* for himself." *Id.* at 744, 745 (emphasis added). Therefore, it is the appellate counsel's failure to conform with *Anders*, irrespective of counsel's decision to formally withdraw from a case, that leaves the defendant "entirely" to his own devices, and entirely without representation. It is also obvious that a defendant left to "shift entirely for himself" is a defendant left, in the words of the *Penson* Court, "completely without representation during the appellate court's actual decisional process." *Penson*, 488 U.S. at 88. Accordingly, in a case where the defendant's appellate attorney does not formally withdraw but fails, nonetheless, to comport with the requirements of *Anders*, the defendant is "completely without representation" and *Penson*'s rule of presumed prejudice must be applied. A failure to apply the rule of presumed prejudice simply because the attorney has not formally withdrawn is a failure to apply the "principle of a precedent in a context where such failure is unreasonable." *Green*, 143 F.3d at 871. It therefore amounts to an "unreasonable application of" clearly established federal law, as determined by the Supreme Court.

This reading of *Penson*'s reach is supported by another circuit. In *Lofton v. Whitley*, 905 F.2d 885 (5th Cir. 1990), the Fifth Circuit considered whether *Penson*'s rule of presumed prejudice extended to a situation where, as here, the appellate counsel had filed a deficient no-merit brief, but had not formally withdrawn from the case. As the Fifth Circuit wrote, "that counsel did not formally withdraw does not appear to be a significant distinction that would change the analysis from the presumed prejudice of *Penson* . . . . Lofton may have been formally represented by counsel, but the *failure to raise any grounds for appeal was the equivalent of his attorney's*

withdrawal." *Id.* at 888 (emphasis added). This part of the court's opinion was based entirely on *Penson* and *Anders*. Accordingly, as the Fifth Circuit confirms, even where an attorney does not formally withdraw from the case, *Anders* and *Penson* dictate that the attorney's failure to comply with the requirements of *Anders* results in the deprivation of the defendant's right to counsel. *See Anders*, 386 U.S. at 745; *Penson*, 488 U.S. at 83-85. Again, it is an unreasonable application of clearly established Supreme Court law not to extend *Penson*'s rule of presumed prejudice to this circumstance.[9]

IV.

In granting Davis' writ on his claim of ineffective assistance of appellate counsel, the district court held that Davis had raised at least three arguable underlying claims: ineffective assistance of trial counsel, insufficiency of the evidence, and jury instruction error. Because the underlying claims were arguable, the district court held that Davis' appellate counsel should have raised them on direct appeal. The district court

[9]That the failure to apply a rule of presumed prejudice in this case is an "unreasonable application of" federal law is also evident from the Supreme Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984). In *Cronic*, decided the same day as *Strickland*, the Supreme Court enunciated conditions where *Strickland*'s prejudice requirement does not apply. The Court held that there are circumstances "that are so likely to prejudice the accused" that prejudice should be presumed. *Id.* at 658. In enumerating these circumstances, the Court wrote that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659. Significantly, *Cronic* cited *Anders* for the proposition that "the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' " *Id.* at 656 (*quoting Anders*, 386 U.S. at 743). As we know from *Anders*, when a counsel files a no-merit brief that fails to comport with the standards enunciated there, the counsel fails to act "in the role of an advocate." Accordingly, *Cronic*, like *Penson*, dictates a rule of presumed prejudice in cases such as the one at bar. Failure to apply that rule amounts to an "unreasonable application of" federal law.

also conducted its own review of these same underlying claims and, under the standards enunciated in 28 U.S.C. § 2254(d), held that Davis did not "establish his entitlement to federal habeas relief" on any of them. The state argues that because the district court denied Davis' petition on the underlying claims, Davis cannot "vindicate" any federal right by returning to the state court for a fresh appeal. The state argues, in essence, that because the district court denied Davis federal habeas relief on his underlying claims, Davis should be estopped from trying to litigate these claims in a state court appeal.

[3] The state's argument is erroneous. The district court's denial of Davis' petition on his underlying claim indicates nothing more than the district court's conclusion that the state court's rejection of those claims was not contrary to federal law as established by the United States Supreme Court. In a direct appeal, the state court would apply an entirely different standard of review to Davis' claims. For this reason, regardless of the district court's ruling as to whether any of these alleged violations entitled him to habeas relief, Davis indeed may vindicate his federal rights by returning to the state court for a fresh appeal.[10]

[4] Moreover, the state's argument, if accepted, would serve to import a prejudice requirement through the back door. The state asks this court to hold that Davis is not entitled to relief on his *Anders* claim because, it believes, his appeal will not succeed. As stated above, where a defendant suffers a violation of *Anders*, he need not show prejudice. He certainly need not show that he will prevail on appeal. *See,*

[10]A heightened standard of harmless error analysis, moreover, applies in federal habeas corpus proceedings. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619 (1993). Under *Brecht*, in a federal habeas proceeding "the standard for determining whether habeas relief must be granted is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 623 (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

e.g., *Penson*, 488 U.S. at 86. Because Davis' appellate counsel failed to comply with the constitutional requirements of *Anders*, Davis is entitled to a fresh state court appeal, irrespective of the district court's resolution of his federal habeas claim. By affording Davis this appeal, his federal right to effective assistance of counsel, enunciated in *Anders*, will be vindicated.

V.

The district court's order granting Davis a writ on the issue of ineffective assistance of appellate counsel is therefore AFFIRMED.